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**BEFORE THE**

# Federal Communications Commission

**WASHINGTON, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Implementation of the Cable Television Consumer Protection and Competition Act of 1992 | ) | MM Docket No. 92-260 |
| | ) | |
| Cable Home Wiring | ) | |

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

TIME WARNER ENTERTAINMENT COMPANY, L.P.
RESPONSE TO PETITIONS FOR RECONSIDERATION

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Dated: May 18, 1993

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SUMMARY


- **The Commission should not amend the point of demarcation in a multiple dwelling unit to be at any point further than twelve inches outside the point where the cable wiring enters the subscriber's dwelling unit.**

The Commission should reject recommendations by both Liberty Cable and NYNEX to set a subjective point of demarcation that may be far outside a subscriber's premises. The demarcation points suggested by both Liberty and NYNEX are incapable of exact determination, thereby necessitating case-by-case determinations as to where the demarcation point actually lies in a given situation. A demarcation point that is well outside the subscriber's dwelling unit is also contrary to the plain language of Section 16(d) and to Congress' intent. Moreover, the extended demarcation points are not necessary to foster competition in the multichannel video programming industry.

- **The definition of "cable home wiring" should not be expanded to include any types of equipment, including passive devices.**

Time Warner opposes Liberty's recommendation that the Commission include passive ancillary equipment such as splitters and conduits or molding in the definition of "cable home wiring" because conduit and molding are not "equipment," and splitters should only be considered part of home wiring if they are located within, or up to twelve inches outside, a subscriber's premises.

- **The Commission should not reconsider its decision regarding the treatment of MDUs with "loop through" or other shared wiring configurations.**

The Commission properly excluded "loop through" and other shared wiring configurations from its home wiring rules, and it should not now amend its rules to include such types of wiring. Inclusion of "loop through" wiring in cases where all the subscribers of an MDU with "loop through" wiring have decided to terminate franchised cable service and receive an alternate service is impracticable because of the frequent turnover of MDU residents. The home wiring rules should also not give control of all the "loop through" wiring in an MDU to the premises owner because such an allocation would necessarily mean that the home wiring rules would apply to some common wiring in the MDU, and this is completely contrary to Congress' intent. Moreover, placing control over all the wiring in a "loop through"-configured building in the hands of one person does not foster competition. A better way to foster competition in MDUs is to allow multichannel video competitors to install their own wiring, and offer their services simultaneously with the franchised cable

cable service. Additionally, application of the home wiring rules upon installation of the wiring raises concerns of unconstitutional takings and questions of who is to be responsible for maintenance of statutorily-mandated technical standards of the wiring.

- **The concern that cable operators will discriminate against customers who choose an alternate service provider is unfounded, and does not warrant special attention in the Commission's rules.**

Wireless Cable's fear that cable operators may discriminate against subscribers who terminate cable service in order to receive an alternate service by requiring those subscribers to purchase their home wiring is entirely unfounded because a cable operator cannot require any terminating subscriber to purchase his home wiring.

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RESPONSE TO PETITIONS FOR RECONSIDERATION

Pursuant to Rule 1.429(f) of the Commission's rules, Time Warner Entertainment Company, L.P., ("Time Warner") hereby respectfully submits this response to the petitions for reconsideration[1] of the Commission's Report and Order[2] in this proceeding. Time Warner is a partnership, which is primarily owned (through subsidiaries) and fully managed by Time Warner Inc., a publicly traded Delaware corporation. Time Warner is comprised principally of three unincorporated divisions: Time Warner Cable, the second largest operator of cable television

[1]On April 1, 1993, three parties -- Liberty Cable Company, Inc. ("Liberty"), NYNEX Telephone Companies ("NYNEX") and Wireless Cable Association International, Inc. ("Wireless Cable") -- filed petitions for reconsideration of the cable home wiring rules. The petitions for reconsideration were noticed in the Federal Register on May 3, 1993.

[2]Report and Order in MM Docket No. 92-260 (released Feb. 2, 1993) ("Report and Order").

systems nationwide; Home Box Office, which operates pay television programming services; and Warner Bros., a major producer of theatrical motion pictures and television programs.

## I. INTRODUCTION

The parties who have petitioned the Commission for reconsideration of the cable home wiring rules[3] seek to amend the rules in ways that are beyond the scope of the Commission's authority under Section 16(d) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[4] that are blatantly contradictory to Congress' intent, and would make enforcement of the rules a highly subjective exercise, resulting in an onslaught of case-by-case determinations to be made by the Commission or another designated body. Time Warner opposes any such changes to the home wiring rules, and urges the Commission not to amend the rules in accordance with petitioners' recommendations.

## II. THE COMMISSION SHOULD NOT AMEND THE POINT OF DEMARCATION IN A MULTIPLE DWELLING UNIT TO BE AT ANY POINT FURTHER THAN TWELVE INCHES OUTSIDE THE POINT WHERE THE CABLE WIRING ENTERS THE SUBSCRIBER'S DWELLING UNIT.

Liberty and NYNEX have asked the Commission to reconsider its decision to set the point of demarcation for multiple

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[3]The Report and Order amends Part 76 of 47 C.F.R. by adding subsections (ll) and (mm) to Section 76.5 and by adding new Sections 76.801-802.

[4]Pub. L. No. 102-385, 106 Stat. 1460, § 16(d) (1992), to be codified at 47 U.S.C. § 544(i) ("Section 16(d)").

dwelling units ("MDUs") at twelve inches outside the point where the cable wiring enters the subscriber's dwelling unit.[5] Liberty has asked the Commission to set the demarcation point at that point, within the common area of the MDU building, "where

[redacted]

demarcation will undoubtedly spark many disputes over where the point of demarcation actually lies. If the Commission feels compelled to amend its clear-cut, twelve-inch point of demarcation, it must also be prepared to handle the onslaught of case-by-case determinations that will accompany such a subjective standard. If the Commission is not prepared, or willing, to handle such determinations, then it must establish who will resolve such disputes and what sort of guidelines shall be followed.[9]

Second, proposals that seek to set the point of demarcation for eventual subscriber control outside the subscriber's dwelling unit are contrary to Congress' intent in enacting Section 16(d). Section 16(d) specifically states that the home wiring rules are to apply to "cable installed by the cable operator <u>within</u> the premises of [the] subscriber."[10] Moreover, Congress has elaborated that Section 16(d) "limits the right to acquire home wiring to the cable installed <u>within the interior premises of a subscriber's dwelling unit</u>,"[11] and that it is "not intended to cover common wiring within the [MDU] building."[12] Extending the

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[9]For example, in NYNEX's proposal, the demarcation point shall be that point "necessary" to achieve the objectives of increased competition and efficient deployment of new services. NYNEX Petition at 2-4. The Commission would have to adjudicate what constitutes "necessary" in each particular situation.

[10]47 U.S.C. § 544(i) (1992) (emphasis added).

[11]H.R. Rep. No. 628, 102d Cong., 2d Sess. 118 (1992) ("House Report") (emphasis added).

[12]<u>Id</u>. at 119.

application of the home wiring rules to wiring that is in the common areas, on the roof, in the basement or that runs all the way to the grounding block of the MDU is, therefore, beyond Congress' intent in enacting the statute, and beyond the scope of authority given to the Commission in Section 16(d).

Finally, Liberty and NYNEX argue that setting the point of demarcation further than twelve inches from the point of entry into the subscriber's dwelling unit is necessary to promote competition.[13] This argument is without merit, given the fact that any multichannel video programming distributor who genuinely desires to serve the residents of MDUs, and make receiving its alternate service effortless for MDU residents, need only install its own wiring in the MDU so that it can provide service to any unit at any time, rather than having to wait until an MDU resident terminates its cable service and obtains its home wiring under the Commission's new rules. Nothing in the home wiring rules, as enacted, prohibits alternate service providers from installing their own wiring and competing for subscribers within an MDU building. Indeed, installation of separate internal wiring by each multichannel distributor in an MDU is the only practical mechanism to allow residents to choose among alternate service providers.

NYNEX contends that competition in MDUs is fostered by minimizing the need to duplicate subscriber home wiring because duplication of wiring adds cost to alternate types of service

[13] Liberty Petition at 2-5; NYNEX Petition at 2-4

that would deter subscribers from selecting that alternate service.[14] What NYNEX overlooks, however, is that cable operators also had to incur the costs associated with installing wiring in MDUs, and their service is, accordingly, more expensive for subscribers than it would be if the cable operators had not already borne the cost of installing their own wiring. Thus, when alternate types of service install their own wiring, they are making the competitive playing field more level by incurring the same costs that cable operators have already incurred.

## III. THE DEFINITION OF "CABLE HOME WIRING" SHOULD NOT BE EXPANDED TO INCLUDE ANY TYPES OF EQUIPMENT, INCLUDING PASSIVE DEVICES.

Liberty has asked the Commission to clarify its definition of "cable home wiring" by indicating that the definition includes "passive ancillary equipment such as splitters and conduits or molding in which the cable is installed."[15] Time Warner opposes such a reading of the Commission's rules for two reasons: conduit and molding are not "equipment," passive or active; and, although splitters are passive equipment, they should only be considered part of the home wiring if located within, or up to twelve inches outside, the premises.

Conduit and molding cannot be deemed to be cable equipment by any means; they are generally fixtures and, as such, are part of the MDU building. In the typical situation, conduit and

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[14]NYNEX Petition at 3-4.

[15]Liberty Petition at 5.

molding in an MDU were never the personal property of the cable operator; rather, they are part of the realty and are the property of the premises owner. Congress did not intend to include parts of realty that were never the property of the cable operator in its definition of cable home wiring, and the Commission should not expand Section 76.5(11) of its rules to include such property.

While splitters are considered cable equipment, they should nevertheless be excluded from the Commission's definition of cable home wiring because Congress explicitly stated its intent that the home wiring rules "not apply to any of the cable operator's other property located inside the home (e.g., converter boxes, remote control units, etc.) or any wiring, equipment or property located outside of the home or dwelling unit."[16] Although the definition adopted by the Commission leaves room for debate over whether passive equipment located within a subscriber's dwelling unit can be considered part of home wiring, the definition, combined with the twelve-inch demarcation point, leaves no doubt that splitters, or other passive equipment, cannot be part of the cable home wiring if they are located further outside the premises than twelve inches. Accordingly, Time Warner asserts that, the Commission's home wiring definition should be construed to exclude passive devices altogether, given the specific intent of Congress to exclude any cable equipment, other than actual wiring, whether inside or

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[16]House Report at 118 (emphasis added).

outside the premises. At the least, however, splitters should be included in the home wiring only if within the home or dwelling unit, or within twelve inches of the same.

## IV. THE COMMISSION SHOULD NOT RECONSIDER ITS DECISION REGARDING THE TREATMENT OF MDUS WITH "LOOP THROUGH" OR OTHER SHARED WIRING CONFIGURATIONS.

The Commission, after carefully considering all comments and reply comments filed with regard to home wiring, specifically decided to exclude "loop through" wiring from its rules "because of the nature of [those] configurations."[17] Liberty and NYNEX assert that the Commission should reconsider this decision not to include "loop-through" or other similar series cable wire in MDUs in the application of the home wiring rules.[18]

Liberty has asked the Commission to amend its exclusion of "loop through" systems in cases where all the subscribers on the "loop through" system have decided to terminate their cable service and take service from an alternate provider.[19] Such an exception to the "loop through" wiring exclusion is wholly impracticable because MDU residents turn over on a frequent basis. The chances of having every resident, upon each turnover, desire alternate service are negligible, and do not warrant an exemption from the carefully reasoned exclusion of "loop through"

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[17] Report and Order at ¶ 12; see also 47 C.F.R. § 76.5(mm) (1993).

[18] See Liberty Petition at 6-7; NYNEX Petition at 4-5.

[19] See Liberty Petition at 6.

systems from the home wiring rules. Furthermore, the turnover in residency in MDUs would create a state of confusion because an MDU building could be within the exemption one month, outside it the next month, and within it again the following month.

NYNEX has taken a different approach to the treatment of "loop through" systems by contending that, in MDUs with "loop through" systems, the wiring should be controlled by the MDU premises owner.[20] NYNEX claims that this approach would promote competition because the wiring would be controlled by "a neutral third party, rather than an incumbent cable services provider."[21] This approach, however, reaches beyond the scope of Section 16(d) and would not, in fact, foster competition in accordance with the objectives of the 1992 Cable Act.[22]

16(d) "is not intended to cover common wiring within the building, but only the wiring within the dwelling unit of individual subscribers."[23] The Commission correctly adhered to Congress' intent in this respect when it excluded all "loop through" systems from the home wiring rules.

Moreover, if the MDU premises owner were given control over all the wiring in his "loop through"-configured building, competition would not be fostered because that owner would have total control over what type of multichannel video service all of the MDU residents receive. If the MDU premises owner chose a multichannel video service other than a franchised cable television operator, any residents who preferred cable service would be denied the opportunity to receive cable, even if they had decided to live in that particular MDU because it promoted the fact that it had "cable service." As Time Warner suggested in its Comments, Reply Comments, and in this Response, a better way to foster competition in MDUs, including those MDUs with "loop through" systems, is to allow each multichannel video programming distributor (including the cable operator) to install its own wiring, and offer its services simultaneously with the franchised cable television service.

NYNEX has also proposed that the Commission require that all future MDU installations of home wiring must eliminate "loop through" and other similar shared use configurations of unpowered

[23]House Report at 119.

coaxial cable.[24] Section 16(d) simply directs the Commission to promulgate rules concerning the disposition of cable home wiring after subscriber termination of service: it does not permit the could allow other multichannel video providers to use the wiring immediately, without contributing any capital to the cost of the installation. For the cable operator, the possibility of investing in installations without the right to retain control over such wiring after it is installed would serve to dissuade

Application of the home wiring rules upon installation of the wiring creates other problems as well. For example, if the cable operator were required to offer to sell the wiring to the subscriber upon installation, and the subscriber chose not to purchase the wiring, who would own that wiring? Ownership cannot automatically vest in the subscriber after a certain number of days, be it seven or thirty,[29] because that constitutes a taking without just compensation. Subscribers cannot simply be given ownership of the wiring by regulatory fiat; rather, the cable operator should have the option to maintain and control the wiring, at least while such operator continues to serve that subscriber. Time Warner is particularly concerned about those situations where a subscriber chooses not to purchase the home wiring, then refuses to give the cable operator access to remove the wiring, and thereby acquires the wiring after the thirty-day period has expired. This would constitute an unconstitutional

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[29]Wireless Cable has asked the Commission to shorten the period of time that a cable operator has to remove home wiring, after a subscriber has opted not purchase the wiring, from thirty days to seven days. This shortened removal deadline is simply another twist on the argument articulated by NYNEX supporting forced abandonment of the wiring upon installation. Any forced abandonment of ownership of the home wiring, without compensation to the cable operator, constitutes an unconstitutional taking without payment of just compensation, and cannot be permitted. _See_ U.S. Const. amend. V ("nor shall private property be taken for public use without just compensation"); _Lucas v. South Carolina Coastal Council_, 112 S. Ct. 2886 (1992); M. Berger and G. Kanner, "Thoughts on the _White River Junction Manifesto_: A Reply to the 'Gang of Five's' View on Just Compensation for Regulatory Taking of Property," 19 Loy. L.A. L. Rev. 685, 707 (1986) ("[i]t is the lack of compensation that offends the Constitution, not the taking [itself]").

taking because it is forcing the cable operator to abandon its property without receiving just compensation.

Furthermore, if the subscriber could own its home wiring immediately upon installation, and allow alternate providers to use the wiring, either in place of or in addition to the cable operator, then the cable operator should not be held wholly responsible for maintenance of the wire, as is currently mandated by the Commission's rules. Any shared or alternate use of the cable wiring necessitates a change in the Commission's technical standards and maintenance rules beyond that provided in the new home wiring rules.[30]

## VI. THE CONCERN THAT CABLE OPERATORS WILL DISCRIMINATE AGAINST CUSTOMERS WHO CHOOSE AN ALTERNATE SERVICE PROVIDER IS UNFOUNDED, AND DOES NOT WARRANT SPECIAL ATTENTION IN THE COMMISSION'S RULES.

Wireless Cable apparently fears that cable operators may discriminate against cable subscribers who terminate cable service in order to receive an alternate service by requiring those subscribers to purchase their home wiring, while abandoning the installed wiring in the homes of other terminating subscribers.[31] This fear is entirely unfounded because a cable operator cannot require any terminating subscriber to purchase his home wiring; rather, the cable operator can only offer to sell the wiring to the subscriber upon termination of cable

[30] See 47 C.F.R. § 76.801 (1993).

[31] Wireless Cable Petition at 6.

service. In light of the fact that no cable operator can force a subscriber to purchase home wiring against the subscriber's will, the Commission should not amend its home wiring rules to contain a bar against such conduct.

**VII. CONCLUSION**

Accordingly, for all of the reasons set forth above, and for all of the reasons set forth in Time Warner's Comments and Reply Comments, the Commission should not amend its home wiring rules to reflect the changes proposed by Liberty, NYNEX and Wireless Cable in their petitions for reconsideration of the Report and Order in this proceeding.

Respectfully submitted,

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Dated: May 18, 1993

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## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Time Warner Entertainment Company, L.P. Response to Petitions for Reconsideration was sent, via first class mail postage prepaid, on this 18th day of May, 1993 to:

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